90-836

No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1990

ANTONIO MARENO, Jr.,

Petitioner,

vs.

THOMAS ROWE,
JET AVIATION OF AMERICA, INC.,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Was it a denial of petitioner's constitutional right to due process under the Fifth Amendment to the federal constitution for the court of appeals to affirm the district court's dismissal on jurisdictional grounds of petitioner's complaint in a civil rights action on the motion of a corporate non-party while ignoring petitioner's timely application under Rule 55(a) of the Federal Rules of Civil Procedure for a notation of default against the defaulting corporate defendant?

2. Was it a denial of petitioner's constitutional right to due process under the Fifth Amendment to the federal constitution for the court of appeals to affirm the district court's failure to give credence to uncontroverted evidence of the integrated status of corporate entities under the control of the petitioner's corporate

employer, the defaulting corporate defendant, in connection with the application of the forum state's long-arm statute to the individual defendant's motion to dismiss the petitioner's complaint in a civil rights action as to him?

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No.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner, Antonio Mareno, Jr., respectfully prays that a writ of certiorari issue to review that portion of the order and decision of the United States Court of Appeals for the Second Circuit entered August 6, 1990, which affirmed the judgment of the United States District Court for the

Southern District of New York(Broderick,J.) entered November 27, 1989.

OPINIONS BELOW

The order of the court of appeals unanimously affirmed with written opinions that branch of the district court's judgment which dismissed the complaint. The panel's accompanying opinions, reported as Mareno v. Rowe, et al, 910 F.2d 1043(2d Cir.,1990), are reproduced in Appendix A to this petition.

On August 20, 1990, petitioner served and filed in the court of appeals a Suggestion for Rehearing in Banc pursuant to FRAP 35. On October 2, 1990, the clerk of the court of appeals entered an order sua sponte treating the suggestion primarily as a Petition for Rehearing before the deciding panel pursuant to FRAP 42 which was denied, and secondarily as a suggestion which was not responded to. The

judgment of affirmance and order on rehear- are reproduced in Appendices B and C to this petition, respectively.

JURISDICTION

The judgment of the court of appeals was entered August 6, 1990, although the time of entry is not noted. Petitioner's Suggestion for Rehearing in Banc was declined on October 2, 1990, and this petition was served and filed within ninety days of the earlier date. The jurisdiction of this court is invoked under Title 28, United States Code, Section 1254(1).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The Fifth Amendment to the Constitution of the United States reads in relevant part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law . . ..

Rule 55 of the Federal Rules of Civil Procedure reads in relevant part:

> (a) Entry. When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or therwise, the clerk shall enter his default.

Section 301 of the Civil Practice Law and Rules(McKinney's Consolidated Laws of New York) reads:

> A court may exercise such jurisdiction over persons, property, or status as might have been exercised heretofore.

Section 302(a)(3)(i) of the Civil Practice Law and Rules(McKinney's Consolidated Laws of New York) reads in relevant part:

> (a) Acts which are the basis of jurisdiction. As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any non-domiciliary, or his executor or administrator, who in person or through an agent:
>
> * * *
>
> 3. commits a tortious act without the state causing injury to person or property within the state . . . if he (i) regularly does or solicits busi-

> ness, or engages in any other persistent course of conduct, . . . in the state, ...

STATEMENT OF THE CASE*/

Petitioner, a black man and a resident of New York State, was hired in November, 1988, by the corporate defendant, a provider of corporate and commercial air transportation, to work as a line service operator at its facility located at Teterboro Airport, Teterboro, New Jersey(31,36). Six weeks into his career-tract job to which he commuted daily from his residence in New York, and while still on probationary status, petitioner was summarily discharged by a recently promoted remote, white supervisor, the co-defendant Thomas Rowe, over a contrived aircraft mishandling incident in which a white co-worker with equal complicity received only a three(3)

*/ Numerals in parentheses are keyed to pages of the Joint Appendix used on the appeal to the court of appeals.

day suspension from duty(23,35,41-45). In discharging petitioner, Rowe acted in concert with petitioner's immediate, white supervisor who was disgruntled over petitioner's hiring at supervisory pay level, and withheld from petitioner a discharge letter which, in accordance with company policy, would have set into motion an internal grievance procedure which would have brought the matter to the attention of the corporate defendant's president, Robert K. Schaeberle, among other things, and provide opportunity for petitioner to vindicate himself(30,32-35,23).

This civil rights action was commenced shortly thereafter(1-5). At that time petitioner was in possession of a number of documents originating from the corporate defendant identifying it as petitioner's employer(31-35,52-56), indicating the dominance of the corporate defendant over corporate entities comprising the Jet Avia-

tion Group in the United States(31), welcoming petitioner as an employee of the Jet Aviation Group(49-50), and, in particular, addressing petitioner as an employee of subsidiary entities identified as Jet Aviation Holdings, Inc.(27-29), and Jet Aviation Executive Air Fleet, Inc.(51,58).

Additionally, during petitioner's tour of duty at Teterboro, he observed the daily presence at the airfield of customers residing in and traveling by car from New York State(38-39), and was aware of the fact that the Teterboro facility offered air charter service to its customers through Executive Air Fleet Corporation, EAF,(48,61) which also maintained a New York City telephone listing(60).

What the petitioner did not know at the time of commencement of suit, but which, nevertheless, surfaced during the

pendency of the motion to dismiss, was that the Jet Aviation Group had acquired in July, 1988, the EAF which operated, among other things, a facility at the Westchester County Airport in Harrison, New York(where petitioner previously had been employed) where it managed and staffed corporate jets for the use of corporations headquartered in the White Plains area(44,64-65). And after its acquisition by the Jet Aviation Group, the EAF functioned in part in the Jet Aviation Group as its personnel and labor relations division(47,51,58), owing to its preexisting experience in handling and processing flight and administrative personnel for corporate aircraft(62,64).

Although Jet Aviation Teterboro, Inc., a Jet Aviation Group entity since July, 1988, functioned both as a hiring agent in giving petitioner employment, and as a managing agent in the operation of the Teterboro

facility, the only telephone listing in Bergen County, New Jersey, the county of its operation, pertaining to the Jet Aviation Group during the period May, 1988, through April, 1989, is a White Pages listing in the name of the corporate defendant(74, 79)- the dominant corporate entity in the Jet Aviation Group(31).

The summons and complaint designating the dominant corporate entity in the Jet Aviation Group, namely, Jet Aviation of America, Inc., and Rowe as defendants, was served on Rowe and one John Vanderhave, line services manager(48) at the Teterboro facility on February 9, 1989, by the Sheriff of Bergen County. Defense counsel, after first procuring from petitioner's counsel a stipulation extending to March 13, 1989, "the time within which defendants may answer or otherwise respond to the complaint" served an answer on behalf of Rowe and Jet Aviation of Teterboro, Inc.

as defendants on March 10, 1989(6). This prompted petitioner's counsel on April 15, 1989, to request the clerk in writing pursuant to FRCP 55(a) and on notice to defense counsel for a notation of default in pleading against the designated corporate defendant(11).

The defendant Rowe did not participate in the motion to dismiss the complaint, or furnish evidence of his residence address (38). And there is no competent evidence in the record as to the place of his residence at the time he was served with legal process in the action(15).

REASONS FOR GRANTING THE WRIT

I.

THE SANCTIONING OF AFFIRMATIVE RELIEF AT THE INSTANCE OF A CORPORATE NON-PARTY BY THE COURT OF APPEALS INFRINGES UPON THE PETITIONER'S DUE PROCESS STATUTORY REMEDY AGAINST THE DEFAULTING CORPORATE DEFENDANT.

In spite of the speculation indulged

in the majority opinion in the court of appeals, only defense counsel know why they undertook to intervene in this civil rights action on behalf of a corporate non-party at the expense of protecting the designated corporate defendant, unless it be that they lacked authority to appear in the action on that party's behalf, and were reluctant to secure such authority even though they sought and obtained an extension of time by way of stipulation in order to respond to the complaint. In any event, inasmuch as the majority opinion correctly recognized that the corporate non-party was the "corporate sibling" of the defaulting corporate defendant, the designation of the parent corporation rather than the subsidiary corporation in the complaint was proper practice which precludes any notion of a "mistake". Standard Lime and Cement Co. v. United States, 503 F. Supp. 938 (Mich.,1980).

The vice of the court of appeals' reasoning lies in the fact that the panel erroneously approached the disposition of this phase of the jurisdictional question with a finality ordinarily reserved for a cause which has had a plenary airing, but in a context in which the cause was before the panel in an incipient stage, namely, pre-discovery. At this stage of the action a plaintiff is entitled to discovery on jurisdictional issues. Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 351 n. 13(1978). And see and compare Gear, Inc. v. L.A. Gear California, Inc., 637 F. Supp. 1323(S.D.N.Y., 1986), wherein discovery was permitted to explore factual issues presented by a Rule 12(b)(2) motion.

In this case, the identity of the proper corporate defendant was beyond question. Documentation given to the petitioner at the time of his hiring,

i.e., insurance certificates, company policy manual published in 1987 before the corporate non-party was created in July, 1988 by the designated corporate defendant, clearly and unequivocally identify the designated corporate defendant as the petitioner's employer(37,52-55). Add to this the mute posture of the district court on this threshold as well as other issues presented on the Rule 12 motion, and the court of appeals had no choice but to stand aside and permit petitioner's due process remedy against a defaulting corporate defendant to run its course. No person not named in the complaint as a party defendant can legally answer in the place of a designated defendant. Adams v. School Bd. of Wyoming Valley West School Dist., 53 F.R.D. 267(Pa.,1971).

Petitioner submits to this court that judicial reticense(district court)

and activism and counsel bashing(court of appeals) are inappropriate substitutes for the procedural due process of which the petitioner has been wrongfully deprived in this case.

II

THE FAILURE OF THE COURT OF APPEALS TO ACKNOWLEDGE THE INTEGRATED POSTURE OF THE CORPORATE ENTITIES UNDER THE CONTROL OF THE DEFAULTING CORPORATE DEFENDANT COLLIDES WITH SUBSTANTIVE DUE PROCESS AS APPLIED TO THE INDIVIDUAL DEFENDANT'S MOTION TO DISMISS THE PETITIONER'S COMPLAINT.

Although a number of cases of general interest have been cited in the majority opinion below relative to nominally separate corporate entities, none involve the employer-employee relationship in a civil rights litigation context. In this connection it is submitted that this court need look no further than the Second Circuit holding in Marshall v. Arlene Knitwear, 608 F.2d 1369(2d Cir.,1979), af-

firming in part and reversing in part, Marshall v. Arlene Knitwear, 454 F. Supp. 715(E.D.N.Y.,1978), and its progeny, Linskey v. Heidelberg Eastern, Inc., 470 F. Supp. 1181, 1184(E.D.N.Y.,1979), to which attention was called by the petitioner in the court of appeals on the subject of nominally separate but integrated corporate entities as collectively constituting an "employer".

The court of appeals ignores the evidence in the petitioner's possession at the outset of the case relative to the vertically integrated posture of the Jet Aviation Group(28,49,58,62) which address the parameters of unification applied in Marshall and Linskey.

What the instant case came down to on the record before the court of appeals is the irrefutable fact that the defaulting corporate defendant, in predictable fashion, descended upon the metropolitan

New York area in 1988 with a vengeance, acquired by purchase the PHH's EAF facilities located at the reliever airports on both sides of the Hudson River, i.e., Westchester County Airport in Harrison, New York, and Teterboro Airport in Teterboro, New Jersey, and utilized the expertise thus gained in personnel matters and corporate air transportation brokerage to staff its newly created FBO facility at Teterboro where the petitioner was subsequently briefly employed in late 1988 to early 1989, while feeding this mere corporate conduit brokered transportation business generated from New York based customers, among others(48). The scenario easily subjects the defaulting corporate defendant to the jurisdiction of the district court sitting in New York in accordance with the forum state's statutes enacted in conformity with the standards enunciated by this court in International

Shoe Co. v. Washington, 326 U.S. 310(1945). See and compare Eck v. United Arab Airlines, Inc., 360 F.2d 804(2d Cir.,1966).

As to the defendant Rowe jurisdiction was obtained under New York's long-arm statute, irrespective of his place of residence which was not established in the evidence of record, by virtue of his significant role as a customer service manager in implementing, if not in formulating, company business policy focused on New York. Kreutter v. McFadden Oil Corp., 71 N.Y.2d 460(1988), 522 N.E.2d 40, Retail Software Services, Inc. v. Lashlee, 854 F.2d 18(2d Cir.,1988); and also by virtue of his commission of a wilful tort against the petitioner for his own misguided reasons rather than in the company's best interests. See Judge Broderick's opinion in Grove Press, Inc. v. C.I.A., 483 F. Supp. 132, 135(S.D.N.Y., 1980), rev'd on other grounds, sub. nom.

Grove Press, Inc. v. Appleton, 649 F.2d 121(2d Cir.,1981).

And, it is no answer for the court of appeals to reject long-arm jurisdiction in this case on the basis of case precedent addressing the "injury" component in terms of physical injury, where, as here, unlike in the physical injury cases, damage to one's reputation in the workplace is transitory in nature, and, as such, may well occur in any location where unfavorable information about one's work history is available for distribution to a potential employer. Ledford v. Delancey, 612 F.2d 883(4th Cir., 1980); Zurek v. Hasten, 553 F. Supp. 745(D.C.Ill.,1982).

In this case the petitioner's presence in New Jersey was miniscule, and connected only with his brief employment tenure there. However, his workplace reputation in the aviation industry was

developed and nurtured at Westchester County Airport in the forum state and county, to which he was likely to return to seek gainful employment following his untimely discharge at Teterboro. It is at Westchester County Airport, then, where the impact of petitioner's wrongful discharge is likely to be felt, given the transitory nature of this non-physical injury. And the implicated tort of defamation by compelled self-publication is only now emerging in the courts in New York. See the opinion of Judge McLaughlin in Elmore v. Shell Oil Co., 46 Empl. Prac. Dec.(CCH) at 38,084(E.D.N.Y., 1988).

Finally, a caveat should be noted in connection with the court of appeals placement of all of its eggs in the Cash[1/] basket. The Cash presence in the case, as with defense counsel's extraordinary at-

1/ Affidavit of Roberta Cash, EAF's vice-president of Human Resources(13-14)

tempt to dictate the agenda for the petitioner to pursue in designating a corporate defendant in this action, is one of expediency only. Her presence likewise fulfills a desire on the part of Teterboro principals at containment of the controversy to the local level in order to avoid the possible wrath of the president, Robert K. Schaeberle, who sits atop the pecking order(30), over the sandbagging of the petitioner at Teterboro in derogation of company policy(32), followed by deliberate suppression of petitioner's grievance rights(23,35).

Cash is a slender reed to cling to at the incipient stage of the action. It is hardly appropriate, much less credible, for a mid-level executive in the acquired company to be in a position to categorically extol the virtues of the corporate infra-structure of the acquiring company beyond the area of the executive's ex-

pertise, which, in this case, is human resources(21,27). It would be more appropriate, and hence, more credible, for that function to be performed by an executive in the acquiring company, which, in this case, would be Schaeberle, or one of the other executives in descending order(30), whom Teterboro officials appear anxious to avoid. Hence, the veracity of the Cash averments is suspect in this regard where they are at variance with promulgated company history which touts the defaulting corporate defendant as being the dominant corporate force in the Jet Aviation Group stateside, and places it in a constantly expanding mode(31).

On the record here the defaulting corporate defendant is the straw that stirs the drink for the Jet Aviation Group. And the failure of the court of appeals to come to terms with that in-

alienable fact has made petitioner the tragic victim of a double standard in that tribunal's pursuit of an agenda other than that dictated by the circumstances of this case.

CONCLUSION

For the reasons stated, and to prevent a grave miscarriage of justice, the petition for a writ of certiorari should be granted.

Respectfully submitted,

/s/

ANTONIO MARENO
Attorney for Petitioner

October, 1990

APPENDIX A - OPINIONS OF THE COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1255—August Term, 1989

(Argued: June 7, 1990 Decided: August 6, 1990)

Docket No. 90-7003

ANTONIO MARENO, JR.,

Plaintiff-Appellant,

—v.—

THOMAS ROWE and JET AVIATION OF AMERICA, INC.,

Defendants-Appellees.

Before:

VAN GRAAFEILAND, MINER and ALTIMARI,
Circuit Judges.

Appeal from judgment entered in the United States District Court for the Southern District of New York (Broderick, *Judge*) dismissing plaintiff-appellant's complaint for lack of personal jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(2) and imposing sanctions pursuant to Federal Rule of Civil Procedure

11 against plaintiff-appellant and his attorney in the amount of $4,800.

Affirmed in part, reversed and remanded in part.

Judge Van Graafeiland concurs in part, and dissents in part, in a separate opinion.

ANTONIO MARENO, SR., Yorktown Heights, N.Y., *for Plaintiff-Appellant.*

STANLEY L. GOODMAN, Roseland, N.J. (James Beach, Grotta, Glassman & Hoffman, of counsel), *for Defendants-Appellees.*

ALTIMARI, *Circuit Judge*:

Plaintiff-appellant Antonio Mareno, Jr. appeals from a judgment entered in the United States District Court for the Southern District of New York (Broderick, *Judge*) dismissing his complaint for lack of personal jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(2) and imposing a $4,800 sanction pursuant to Federal Rule of Civil Procedure 11. On this appeal, Mareno complains that the district court incorrectly held that defendants-appellees Jet Aviation of America, Inc. ("JAA") and Thomas Rowe were not amenable to suit under either New York's corporate presence doctrine or New York's long arm jurisdiction statute. *See* N.Y. Civ. Prac. L. & R. §§ 301, 302(a)(3) (McKinney 1990).

Mareno also argues that the district court's imposition of a $4,800 sanction was improper.

For the reasons stated below, we affirm the district court's dismissal of Mareno's complaint and reverse the sanction.

BACKGROUND

This appeal arises from an action filed by Mareno in the United States District Court for the Southern District of New York claiming that he was wrongfully discharged from his job with JAA in violation of his civil rights under 42 U.S.C. §§ 1981 *et seq.* and 42 U.S.C. §§ 2000a *et seq.* The complaint alleged that defendant-appellee Rowe, one of Mareno's supervisors, acted in concert with another supervisor to discharge Mareno on the basis of false accusations of dereliction in the performance of his employment duties. While the complaint named JAA as the corporate defendant, Mareno actually was employed by JAA's corporate sibling, Jet Aviation of Teterboro, Inc. ("JTEB").

The relationship of these corporations is complex. JAA, a Delaware corporation, and JTEB, a Maryland corporation, conduct fixed base operations ("FBOs") at various airports throughout the country. The FBOs provide maintenance service for aircraft. JAA operates FBOs at several airports throughout the United States, none of which is located in New York. JTEB operates a single FBO at the airport in Teterboro, New Jersey, where Mareno was employed as a line service technician. JTEB and JAA are wholly-owned subsidiaries of Jet Aviation Holdings, Inc. ("JHDG"), a Delaware corporation. JHDG also owns a third subsidiary, Executive

Air Fleet ("EAF"), a Delaware corporation. EAF manages private corporate aircraft, providing flight and administrative personnel at various airfields throughout the United States, including the White Plains, New York, Airport. Maintenance of the aircraft managed by EAF is performed by contractors selected through a competitive bidding process, with most of the work being performed by Butler Aviation, a competitor of JAA and JTEB. EAF does not conduct FBOs at any location. Affidavits submitted by the defendants clearly establish that the various subsidiaries of JHDG are wholly separate from each other, maintaining their own corporate books, employees, assets, and business operations.

Following service of Mareno's complaint, an answer was interposed by JTEB on behalf of itself and Rowe. It noted that the complaint "incorrectly referred to [JTEB] as 'Jet Aviation of America, Inc.' " Mareno's request for a notation of default for the failure of JAA to file a responsive pleading was denied by the district court. Defendants moved to dismiss the complaint for, *inter alia*, lack of personal jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(2). Defendants also moved for sanctions under Federal Rule of Civil Procedure 11, arguing that Mareno's claim of jurisdiction, in the complaint and in his opposition to defendants' motion to dismiss, was without basis in law or fact. The district court granted defendants' motion to dismiss and imposed sanctions against Mareno and his attorney in the amount of $4,800.

DISCUSSION

As a preliminary matter, Mareno contends that the answer interposed by JTEB on behalf of JAA is improper because JTEB was not a party named in his complaint. Although Mareno may be technically correct, pleadings are to be construed liberally so "as to do substantial justice." Fed. R. Civ. P. 8(f); *see Friedlander v. Cimino*, 520 F.2d 318, 320 (2d Cir. 1975) (per curiam). The answer was obviously intended to notify, and in point of fact did notify, Mareno and the court that JTEB was the real employer and the proper defendant. Further, the answer was filed on behalf of the party that Mareno evidently intended to sue and adequately responded to the allegations contained in the complaint. *See Datskow v. Teledyne, Inc.*, 899 F.2d 1298, 1301-02 (2d Cir. 1990); *Boring v. Kozakiewicz*, 833 F.2d 468, 470-71 (3d Cir. 1987), *cert. denied*, 485 U.S. 991 (1988). Therefore, the district court properly denied Mareno's request for a notation of default against JAA.

Turning to the principal basis for this appeal, Mareno argues that the district court improvidently dismissed his complaint for lack of personal jurisdiction over the defendants. Where the underlying action is based on a federal statute, we are to apply state personal jurisdiction rules if the federal statute does not specifically provide for national service of process. *Omni Capital Int'l v. Rudolf Wolff & Co.*, 484 U.S. 97, 104-05 (1987); *accord Canterbury Belts Ltd. v. Lane Walker Rudkin, Ltd.*, 869 F.2d 34, 40 (2d Cir. 1989). In this case, Mareno argues that the defendants are amenable to suit under New York's corporate presence doctrine and under its long arm statute. *See* N.Y. Civ. Prac. L. & R. §§ 301, 302(a)(3). We disagree.

Under section 301, an entity is amenable to jurisdiction in New York if it is "doing business" in New York so as to establish its presence in the state. *Ball v. Metallurgie Hoboken—Overpelt, S.A.*, No. 89-7826, slip. op. 3271, 3279 (2d Cir. Apr. 27, 1990); *Hoffritz for Cutlery, Inc. v. Amajac, Ltd.*, 763 F.2d 55, 58 (2d Cir. 1985). A foreign corporation is said to be "doing business" in New York if it engages in a continuous and systematic course of conduct in New York. *Laufer v. Ostrow*, 55 N.Y.2d 305, 309-10, 434 N.E.2d 692, 694, 449 N.Y.S.2d 456, 458 (1982); *Frummer v. Hilton Hotels Int'l, Inc.*, 19 N.Y.2d 533, 536, 227 N.E.2d 851, 853, 281 N.Y.S.2d 41, 43, *cert. denied*, 389 U.S. 923 (1967). Neither JTEB nor JAA solicits business, has offices, holds bank accounts or property, or employs individuals in New York; thus, none of the factors indicative of presence have been demonstrated. *See Hoffritz*, 763 F.2d at 58.

Equally unavailing is Mareno's argument that EAF's presence in New York is a predicate for the exercise of jurisdiction over the corporate defendant. EAF exists as a discrete corporate entity and performs a business function wholly unrelated to the operation of FBOs. In light of the tenuous connection between EAF and its corporate siblings, it stretches the imagination to argue that EAF acts as an agent or department of JAA or JTEB. *See Delagi v. Volkswagenwerk AG*, 29 N.Y.2d 426, 432, 278 N.E.2d 895, 897, 328 N.Y.S.2d 653, 657 (1972); *Frummer*, 19 N.Y.2d at 537, 227 N.E.2d at 853-54, 281 N.Y.S.2d at 44. Accordingly, there is no basis to attribute EAF's New York contacts to its corporate siblings.

Mareno further contends that the court may exercise jurisdiction over the corporate defendant under section 302(a)(3) of New York's long arm statute. Again, we

disagree. Section 302(a)(3) requires that a plaintiff demonstrate, *inter alia*, that the defendant "committ[ed] a tortious act without the state causing injury to person or property within the state." To satisfy this requirement Mareno argues that he was injured within the state by virtue of the fact that he has suffered financial loss in New York. An injury, however, does not occur within the state simply because the plaintiff is a resident. "[T]he situs of the injury is the location of the original event which caused the injury, not the location where the resultant damages are subsequently felt by the plaintiff." *Carte v. Parkoff*, 152 A.D.2d 615, 616, 543 N.Y.S.2d 718, 719 (2d Dep't 1989) (quoting *Hermann v. Sharon Hosp., Inc.*, 135 A.D.2d 682, 683, 522 N.Y.S.2d 581, 583 (2d Dep't 1987)). Thus, despite the fact that Mareno may suffer the economic consequences of his firing in New York, the location of the original event which caused the injury is New Jersey. Undoubtedly, the exercise of personal jurisdiction must be based on a more direct injury within the state and a closer expectation of consequences within the state than the type of indirect financial loss alleged by Mareno. *See Fantis Foods, Inc. v. Standard Importing Co.*, 49 N.Y.2d 317, 326-27, 402 N.E.2d 122, 126, 425 N.Y.S.2d 783, 787 (1980); *see also American Eutectic Welding Alloys Sales Co. v. Dytron Alloys Corp.*, 439 F.2d 428, 433 (2d Cir. 1971).

Similarly, defendant Rowe, a New Jersey resident, who conducts no business in New York, is amenable to suit only if his activities fall within New York's long arm statute. Once again, Mareno invokes section 302(a)(3) but fails to establish that Rowe's activities as a supervisor of JTEB in New Jersey resulted in a direct injury to Mareno in New York. *See Fantis Food*, 49

N.Y.2d at 326-27, 402 N.E.2d at 126, 425 N.Y.S.2d at 787. Thus, as with the corporate defendant, the district court properly granted the motion to dismiss for lack of personal jurisdiction.

Finally, Mareno challenges the district court's imposition of sanctions under Federal Rule of Civil Procedure 11. Until today, we reviewed whether a party's legal argumentation is "frivolous" within the meaning of Rule 11 under a *de novo* standard. *See, e.g., Securities Indus. Ass'n v. Clarke*, 898 F.2d 318, 321 (2d Cir. 1990); *McMahon v. Shearson/American Express, Inc.*, 896 F.2d 17, 21-22 (2d Cir. 1990) (discussing three-tiered standard of Rule 11 review). However, the Supreme Court in *Cooter & Gell v. Hartmarx, Corp.*, 58 U.S.L.W. 4763, 4769 (U.S. June 11, 1990), held that "an appellate court should apply an abuse-of-discretion standard in reviewing all aspects of a district court's Rule 11 determination." Of course, the Court recognized that legal errors on the part of the district court will constitute an abuse of discretion. *Id.* at 4768-69. Our review of the district court's decision to impose sanctions in the present case is in accordance with the deferential standard mandated by *Cooter & Gell*.

There is no doubt that the arguments presented by Mareno were not persuasive. Nevertheless, to constitute a frivolous legal position for purposes of Rule 11 sanction, it must be clear under existing precedents that there is no chance of success and no reasonable argument to extend, modify or reverse the law as it stands. *Int'l Shipping Co. v. Hydra Offshore, Inc.*, 875 F.2d 388, 390 (2d Cir.), *cert. denied*, 110 S. Ct. 563 (1989). Thus, not all unsuccessful legal arguments are frivolous or warrant sanction. *Cf. Securities Indus. Ass'n*, 898

F.2d at 321-22; *McMahon*, 896 F.2d at 22; *Motown Prod., Inc. v. Cacomm, Inc.*, 849 F.2d 781, 785 (2d Cir. 1988) (per curiam). The positions advanced by Mareno and his attorney, however faulty, were not so untenable as a matter of law as to necessitate sanction. Nor did they constitute the type of abuse of the adversary system that Rule 11 was designed to guard against. *See* Fed. R. Civ. P. 11 Advisory Committee Note to 1983 Amendment; *see also Securities Indus. Ass'n*, 898 F.2d at 322; *Motown Prod.*, 849 F.2d at 785; *McMahon*, 896 F.2d at 22. Simply put, we believe that the award of a $4,800 sanction was inappropriate in this case and failed to recognize the complexities of New York's long arm jurisprudence.

We also deny appellees' request that appellate sanctions be imposed upon Mareno. *See* Fed. R. App. P. 38; *see also Cooter & Gell*, 58 U.S.L.W. at 4769. Mareno has not demonstrated the vexatious tactics or manifest bad faith that usually prompts the imposition of appellate sanctions. *See Rodriguez Alvarez v. Bahama Cruise Line, Inc.*, 898 F.2d 312, 317-18 (2d Cir. 1990); *Chalfy v. Turoff*, 804 F.2d 20, 23 (2d Cir. 1986).

CONCLUSION

For the reasons set forth above, the judgment of the district court dismissing Mareno's complaint is affirmed and that part of the judgment imposing the Rule 11 sanction against Mareno and his attorney is reversed. Accordingly, the case is remanded to district court for modification of the judgment consistent with this opinion.

VAN GRAAFEILAND, *Circuit Judge*, concurring in part and dissenting in part:

I agree with my colleagues that the district court did not err in dismissing the complaint. I disagree with my colleagues' decision to reverse the imposition of sanctions. An explanation of why I dissent on the sanctions issue requires that I elaborate briefly on both the facts and the law.

From November 29, 1988 until he was discharged on January 12, 1989, Antonio Mareno, Jr. (hereinafter "plaintiff") was employed by Jet Aviation of Teterboro, Inc. Five days after plaintiff's discharge, his attorney, without so much as a prior nod in the direction of the EEOC, brought this action in the Southern District of New York seeking $1.5 million in damages. Before plaintiff's attorney hastened so precipitately into court, he was bound to make reasonable inquiry to ascertain that the complaint which he prepared and signed was "well grounded in fact." Fed. R. Civ. P. 11. My colleagues correctly identify plaintiff's employer as Jet Aviation of Teterboro, Inc. They neglect to state, however, that, if plaintiff's attorney had made reasonable inquiry as required by Rule 11, he easily would have ascertained this to be the fact. On November 28, 1988 plaintiff executed an "AN EMPLOYEE NON-DISCLOSURE AGREEMENT" which identified "Jet Aviation/ Teterboro, Inc. ('the Company'), a Delaware corporation having its principal place of business at Teterboro Airport, Teterboro, New Jersey" as plaintiff's employer. Over the Rule 11 certification of plaintiff's attorney, the complaint, with no reference whatever to Jet Aviation of Teterboro, Inc., alleges that "between

November 29, 1988, and January 12, 1989, [plaintiff] was employed by defendant Jet Aviation of America, Inc." This was an obvious and inexcusable mistatement of fact.

The balance of plaintiff's complaint demonstrates a complete disregard of the requirements of Fed. R. Civ. P. 8. Pursuant to that Rule, the complaint was required to contain "a short and plain statement of the grounds upon which the court's jurisdiction depends." The complaint states that plaintiff resides in New York's Westchester County and that his employment was in New Jersey. It alleges that Jet Aviation of America, Inc. is a Massachusetts corporation which operates a business at Teterboro Airport in New Jersey, where plaintiff was employed, and that the defendant Rowe [no residence specified but actually a New Jersey resident] was employed by Jet Aviation of America, Inc. at the Teterboro Airport. There is a not a single allegation in the complaint that justifies suit in the Southern District of New York. I agree with my colleagues that the district court had no personal jurisdiction over the defendants. However, I would go a step further and hold that the complaint does not even state grounds upon which a claim of jurisdiction could be based.

Rule 8 also requires that the complaint contain "a short and plain statement of the claim showing that the [plaintiff] is entitled to relief." The philosophy underlying this Rule is plainly applicable to the instant case. "If a civil rights complaint is to survive a motion to dismiss, it must make specific factual allegations indicating a deprivation of rights." *Fonte v. Board of Managers of Continental Towers Condominium*, 848 F.2d 24, 25 (2d Cir. 1988). Plaintiff's complaint alleges that he was

summarily discharged on the erroneous ground that he had improperly stored a jet plane too close to another plane so that both planes were damaged and that as a result he was deprived of his civil rights. This does not state a civil rights violation, and there are no other factual allegations in the complaint that do. As it stands, the complaint is fatally defective and this fact alone would warrant sanctions. *Oliveri v. Thompson*, 803 F.2d 1265, 1280 (2d Cir. 1986), *cert. denied*, 480 U.S. 918 (1987).

Finally, I deem it significant that plaintiff's attorney rejected the defendants' laudable attempts to remedy the attorney's shoddy practices. Defense council interposed an action on behalf of Jet Aviation of Teterboro, Inc., plaintiff's actual employer, stating that plaintiff had incorrectly referred to it as Jet Aviation of America, Inc.. Defense council also offered to stipulate transfer of the action from New York to New Jersey where it belonged. Instead of adopting these reasonable solutions to the problems he had created, plaintiff's attorney stubbornly continued along the wrong path he had chosen.

In *Cooter & Gell v. Hartmarx Corp.*, 58 U.S.L.W. 4763 (June 12, 1990), the Supreme Court stated that a district court has "broad discretion" in imposing Rule 11 sanctions. *Id.* at 4769. The Court said that abuse of such discretion would be found if the district court "based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence." *Id.* My colleagues say that their review of the district court's decision to impose sanctions is in accordance with this "deferential standard." I respectfully but strongly disagree. The conduct of plaintiff's attorney evidenced a complete lack of respect for our trial courts. Our condo-

nation of such conduct will only encourage its repetition. Because I believe that in their exercise of Rule 11 sanctions, our district court judges deserve greater deference from our court than Judge Broderick is receiving in the instant case, I dissent.

APPENDIX B - JUDGMENT OF THE COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT
___0___

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the sixth day of August one thousand nine hundred and ninety.

Present: HON. ELLSWORTH A. VAN GRAAFEILAND
HON. ROGER J. MINER
HON. FRANK X. ALTIMARI

Circuit Judges,

ANTONIO MARENO, JR., 90-7003

Plaintiff-Appellant,

-v.-

THOMAS ROWE and JET AVIATION OF AMERICA, INC.,

Defendant-Appellees.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the

transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the Judgment of said District Court be and it hereby is affirmed in part and reversed and remanded in part to the said District Court for further proceedings consistent with this opinion.

ELAINE B. GOLDSMITH,
Clerk

By: /s/ Edward J. Guardaro
EDWARD J. GUARDARO,
Deputy Clerk

APPENDIX C - ORDER ON REHEARING IN COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

___0___

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, in the City of New York, on the second day of October, one thousand nine hundred and ninety.

DOCKET NUMBER 90-7003

ANTONIO MARENO, JR.,

Plaintiff-Appellant,

-v.-

THOMAS ROWE,
JET AVIATION OF AMERICA, INC.,

Defendants-Appellees.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by Plaintiff-Appellant ANTONIO MARENO, JR.

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehear-

ing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

/s/ Elaine B. Goldsmith
ELAINE B. GOLDSMITH
Clerk